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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/726,329	12/01/2003	Erik E. Emstad	6683.75USU1 (1292.1228101)	3659
28075	7590	07/08/2008	EXAMINER	
CROMPTON, SEAGER & TUFTE, LLC			SWIGER III, JAMES L	
1221 NICOLLET AVENUE				
SUITE 800			ART UNIT	PAPER NUMBER
MINNEAPOLIS, MN 55403-2420			3733	
			MAIL DATE	DELIVERY MODE
			07/08/2008	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/726,329	EMSTAD ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	JAMES L. SWIGER	3733	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 17 March 2008.  
 2a) This action is **FINAL**.                    2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-25 is/are pending in the application.  
 4a) Of the above claim(s) 22-25 is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1-21 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on 01 December 2003 is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ .                                    |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____.   | 6) <input type="checkbox"/> Other: _____ .                        |

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-13 and 16-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jacobson (US Patent 4,545,374) in view of Ogawa et al. (US Patent 5,976,146). Jacobson discloses a spinal device that is capable of allowing access to the appropriate region of the spine, and specific pedicle locations. Jacobson discloses an instrument that has a portal member (31) that has an elongated aperture (32), a blade member (18, see also fig. 8) that is positionable along the aperture of the portal member with a blade-end, and also a placement wire (33) wherein the blade member is capable of moving relative to the wire in use of the device.

The device is also capable of providing access to two pedicle locations due to its elongated shape. Jacobson also has what is considered a stopping structure (36) as it enables two portions at least (wire and portal) to have controlled movement relative to one another. Jacobson also discloses pins (43).

Jacobson discloses the claimed invention except for a layered, nested, incremental portal assembly in the device and also wherein the placement wire is relocated to be within part of the blade. Ogawa et al. discloses device to assist in accessing a surgical site having nested, tube-like guides (Fig. 1A, and 8a-d) as well as

a guidewire (1) which goes through the guide device to assist in more precise targeting of the blade and entry into the spinal area. See also (Col. 11, lines 20-40). It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Jacobson having at least a guidewire extending through the blade and nested dilators in view of Ogawa et al. to have improved access to the spinal area and improved precision during surgery.

Claims 14 -15 rejected under 35 U.S.C. 103(a) as being unpatentable over Jacobson '374 and Ogawa' 146 and further in view of Koros et al. (US patent 5,928,139).

The combination of Jacobson and Ogawa disclose the claimed invention except for, more specifically, a sleeve that has outer portions that create a collar, and a clamping plate to help orient the device. Koros et al. disclose a spinal access device that has a portal member (Fig. 1) that has a collared portion (34) extending from a pivot location (approx 38). Additionally the collared portion discloses a clamp plate (14/18/24/16) that helps to orient the different sleeve sections. These modifications allow for optimum placement and maneuverability to access the spinal area desired (Col. 3, lines 25-55). It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of the combination of Jacobson and Ogawa having at least the outer collared portions and a clamping plate in view of Koros et al. to better size and arrange the spinal access instrument as required.

### ***Response to Arguments***

The objection to the Oath/Declaration in view of current Office policies.

Applicant's arguments with respect to claims 1-21 have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES L. SWIGER whose telephone number is (571)272-5557. The examiner can normally be reached on Monday through Friday, 9:00am to 5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JAMES L SWIGER/  
Examiner, Art Unit 3733

/(Jackie) Tan-Uyen T. Ho/  
Supervisory Patent Examiner, Art Unit 3773